YONG SIEW CHEN v. TANG KA LEONG & ANOR

HIGH COURT SABAH & SARAWAK, SIBU
WONG SIONG TUNG J
[CRIMINAL REVISION CASE NO: SBW-43-3-11-2022]
26 JUNE 2023
[2023] CLJ (JT14)

Abstract – *The High Court is conferred, under s. 323 of the Criminal Procedure Code, a kind of paternal or supervisory jurisdiction to correct a miscarriage of justice arising from a misconception in law, irregularity of procedure, neglect of proper precautions or apparent harshness of treatment, resulting, on the one hand, in some injury to the due maintenance of law and order, or, on the other hand, in some undeserved hardship to individuals. While a miscarriage of justice is often associated with a wrongful conviction of an accused, it can occur when the prosecution demonstrates incompetence or engages in perfunctory conduct, resulting in an acquittal or discharge of the accused. The conduct of the prosecution, in closing its case hastily and somewhat lackadaisically, disregarding the necessary steps, leading to the acquittal of the accused person, undermined a fair trial, warranting the exercise of revisionary powers by the High Court.*

CRIMINAL PROCEDURE: *Prosecution – Conduct of criminal prosecution – Omissions by prosecution – Whether prosecution of charge conducted incompetently and in perfunctory manner – Whether rendered trial perfunctory and lethargic – Whether incompetence of prosecution led to acquittal and discharge of accused person – Whether omissions impacted 'the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity' of Magistrates' Court proceedings – Whether Magistrate's decision set aside by High Court in exercise of revisionary power – Criminal Procedure Code, s. 323*

CRIMINAL PROCEDURE: *Revision – Application for – Exercise of revisionary jurisdiction of High Court under s. 323 of Criminal Procedure Code – Whether exercised to correct miscarriage of justice – Whether miscarriage of justice attributed to incompetent investigation and/or prosecution leading to acquittal of accused – Whether omissions by prosecution rendered trial perfunctory and lethargic – Whether omissions impacted 'the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity' of Magistrates' Court proceedings – Whether revision ought to be allowed*

The deceased was killed in a fatal road accident allegedly arising from a collision between the motorcycle ridden by the deceased and the motor car driven by the first respondent. The first respondent was charged at the Magistrates' Court for an offence of driving a vehicle while under the influence of alcohol causing the death of the deceased, under s. 44(1) of the

Road Transport Act 1987 ('RTA'). The first respondent pleaded not guilty to the charge. The Magistrate, *inter alia*: (i) rejected the blood specimen adduced by the prosecution to establish that the respondent was at the material time under the influence of alcohol, having found that the prosecution's failure to call the medical officer who took the blood specimen and the failure to produce the required certificate under s. 45F(3) of the RTA resulted in the break in the chain of evidence and that the blood specimen thus taken from the first respondent/accused had to be disregarded; (ii) held that the prosecution failed to provide a detailed explanation on how the collision occurred; (iii) found that the investigating officer ('PW8') only read the legend of the sketch plan without explaining the events leading to the collision; and (iv) the prosecution failed to explain and appraised the court regarding the value of the sketch plan or how was it that it was the fault of the first respondent/accused in the collision. The Magistrate, finding that the prosecution had failed to establish a *prima facie* case, acquitted and discharged the first respondent without requiring him to enter defence. The Public Prosecutor did not appeal against the decision. Hence, the applicant, the mother of the deceased, requested the court to review the decision of the Magistrates' Court under s. 323 of the Criminal Procedure Code ('CPC'). The applicant contended that the prosecution officer conducted the trial incompetently or in a perfunctory manner, resulting in insufficient evidence being adduced to establish a *prima facie* case, causing a miscarriage of justice. The applicant prayed that the criminal revision be allowed and for this court to exercise its power under s. 317 of the CPC to order the taking of further evidence in respect of the related matters or, to order a retrial of the case under s. 316 of the CPC.

Held (allowing applicant's application for revision and setting aside decision of Magistrates' Court; case remitted to Magistrates' Court for retrial):

(1) The revisionary jurisdiction and power under ss. 323, 324 and 325 of the CPC can be exercised by the court to correct a miscarriage of justice attributed to the incompetent investigation and/or incompetent prosecution of a charge which led to the acquittal of an accused. While the term 'miscarriage of justice' is often associated with wrongful convictions of accused, it can occur when the prosecution demonstrates incompetence or engages in perfunctory conduct, resulting in an acquittal or discharge of the accused. Therefore, the acquittal of the guilty can be just as much a miscarriage of justice as the conviction of an innocent person. (paras 53, 59 & 77)

(2) It was not only essential but indeed elementary for the investigation officer and the prosecution officer to both know and to establish that the blood specimen analysed by the chemist, PW2, was indeed obtained from the first respondent. There was evidence by PW2 which established that he had carried out alcohol analysis and test of the blood

specimen in a plastic tube delivered to him by PW8, alleged to have been collected from the first respondent. However, the prosecution officer conducting the trial did not see it fit as a matter of cogency to introduce and produce the tube of blood specimen allegedly analysed by PW2 and to call and/or examine witnesses to establish the chain of evidence that the tube of blood specimen was taken from the first respondent, so analysed by PW2, returned to PW8 and presented in court as exhibit. (paras 83-85)

(3) When prosecuting a charge under s. 44 of the RTA, for driving a motor vehicle under the influence of alcohol resulting in the death of another person, it is imperative for the investigation officer and prosecution officer to be well-versed in the provisions specified in s. 45F of the RTA, which outlined the procedure for obtaining a blood specimen from an accused for alcohol content analysis and testing. The notes of proceeding for the trial before the Magistrate revealed glaring omissions and neglects – no witnesses were called to give evidence on the collection of the blood specimen from the first respondent/accused. Crucial evidential details, such as who collected the specimen, when it was obtained, and the subsequent handling leading to its delivery by PW8 to PW2 for alcohol analysis remained unaddressed. There was also apparent failure to comply with the requirements outlined in s. 45F(3) and (4) of the RTA regarding the production of document with certification by the Government medical officer, attesting to the taking of the blood specimen from the first respondent. (paras 86, 90 & 91)

(4) Regarding the cause of the collision between the two vehicles, PW8 provided evidence that he prepared the sketch plan, and also testified about the meaning of the markings stated in the sketch plan. However, the prosecution officer failed to question PW8 to explain the process of preparing the sketch plan and to give an explanation regarding the meaning and implication behind the various markings and measurements. (paras 95 & 96)

(5) There was also lack of consistency in the testimony of PW6, who testified about the presence of CCTV cameras, alleged to have captured the collision that occurred during the relevant time. PW6 stated that she retrieved the recorded footage, saved it on a pendrive and handed it over to a police officer. However, during cross-examination, PW6 mentioned of her responsibility to switch the CCTV cameras on and off when she started and finished working, from 7.50am to 5.15pm. The inconsistency arose as to how the CCTV could capture the collision after her office hours. The Magistrate should have allowed the prosecution to clarify the inconsistencies rather than concluding that PW6's answer was clear and that no further examination was necessary. (paras 97, 98 & 101)

(6) PW8 testified that he obtained the CCTV footage and burned it onto a CD. Unfortunately, the CD could not be played in the courtroom during the proceedings, preventing PW8 from confirming its contents. Despite that, the prosecution officer neglected to further inquire on the process used to burn the CCTV footage onto the CD and about the source of the pendrive or attempted to present it as evidence. Given the numerous omissions, the conduct of the trial for the offence by the prosecution and investigation officer was found to be perfunctory and lethargic. (paras 103, 104 & 106)

(7) The Magistrate failed to consider and recognise the necessity of exercising the power conferred upon the Magistrates' Court under s. 425 of the CPC to ensure a just decision in the case. These omissions went to and impacted 'the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity' of the proceedings in the Magistrates' Court envisaged by s. 323 of the CPC. Whether the omissions were due to oversight, ignorance, negligence, intentional or unintentional or whatever motivation, the demonstrated standard of competency in the conduct of the prosecution fell significantly below the reasonable expectations of fairness and justice to the complainant/victim and to the public for upholding public confidence in the administration of justice. (paras 107-109)

Case(s) referred to:

Emperor v. Nasrullah & Others AIR 1928 All 287 ***(refd)***
K Chinnaswamy Reddy v. State Of Andhra Pradesh 1962 AIR 1788 ***(refd)***
Kanagaraj v. State of Tamil Nadu (2007) 2 MLJ (Crl) 5 ***(refd)***
Kocharya v. The State of Maharashtra (2010) 112 Bom LR 1975 ***(foll)***
Liaw Kwai Wah & Anor v. PP [1987] 1 CLJ 35; [1987] CLJ (Rep) 163 SC ***(refd)***
Mohammad Ali Mohd Noor v. PP [1996] 3 SLR 276 ***(refd)***
Ng Kim Han & Ors v. PP [2001] 2 SLR 293 ***(refd)***
PP v. Abdul Rahim Abdul Satar [1990] 1 CLJ 840; [1990] 3 CLJ (Rep) 1 HC ***(refd)***
PP v. Harilal Sachi Narayan [1995] 4 CLJ 745 HC ***(refd)***
PP v. Kulasingam [1974] 1 LNS 118 HC ***(refd)***
PP v. Phon Nam [1989] 1 CLJ 7; [1989] 1 CLJ (Rep) 142 SC ***(refd)***
PP v. Zhao Jingeng & Ors [2010] 7 CLJ 516 HC ***(refd)***
Rajendran M Gurusamy v. PP [2001] 1 CLJ 631 HC ***(refd)***
Ramli Kechik v. PP [1986] 1 CLJ 308; [1986] CLJ (Rep) 243 SC ***(refd)***
Re Radha Krishna Naidu [1961] 1 LNS 112 HC ***(refd)***
Re Soo Leot [1955] 1 LNS 127 HC ***(refd)***
Reg v. Sang [1980] AC 402 ***(refd)***
Saravanan Ganesan v. PP [2003] SGHC 273 ***(refd)***
Sia Cheng Soon & Anor v. Tengku Ismail Tengku Ibrahim [2008] 5 CLJ 201 FC ***(refd)***
Tan Sri Eric Chia Eng Hock v. PP [2007] 1 CLJ 565 FC ***(refd)***
Ti Chuee Hiang v. PP [1995] 3 CLJ 1 FC ***(dist)***
UJ Iyyappan v. The State Of Kerala; Rosy; & Abraham @ Avarachan Crl.Rev.Pet. No. 155 of 2002 ***(refd)***
Yahya Hussein Mohsen Abdulrab v. PP [2021] 9 CLJ 414 FC ***(dist)***
Zahira Habibulla H Sheikh v. State of Gujarat AIR 2004 SC 3114 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 315, 316, 317, 323, 324, 325(1), (3), 376(1), 399, 425
Dangerous Drugs Act 1952, s. 39B(1)(a), (2)
Federal Constitution, art. 145(3)
Road Transport Act 1987, ss. 44(1)(b), 45F(3), (4), 45G(1)

Criminal Procedure Code [Ind], ss. 161(3), 311
Penal Code [Ind], s. 302

For the applicant - Boston Ho (acting as amicus curiae)
For the 1st respondent - Yap Hoi Liong & Lim Mei Chung; M/s Yap Hoi Liong & Co Advocs
For the 2nd respondent - Mark Kenneth Netto; DPP

Reported by S Barathi

JUDGMENT

Wong Siong Tung J:

Introduction

[1] The applicant is the mother of the late Chipedo Lee Chi Zhen, the deceased.

[2] The deceased was killed in a fatal road accident on 16 May 2020 allegedly arising from a collision between the motorcycle ridden by the deceased and the motorcar driven by the first respondent/accused.

[3] Following the road accident, the first respondent/accused was charged before the Magistrate Court in Case No. SBW-83-444/11-2020, for an offence of driving a vehicle while under the influence of alcohol and which caused the death of the deceased under s. 44(1) of the Road Transport Act 1987 (RTA).

[4] On 26 November 2020, at the close of the prosecution's case, the Magistrate Court decided to acquit and discharge the first respondent/accused of the charge.

[5] The Public Prosecutor did not appeal against the said decision.

[6] By a letter dated 24 October 2022, the applicant requested the court to review the said decision of the Magistrate Court under s. 323 of the Criminal Procedure Code (Act 593) (CPC).

The Charge Against The First Respondent, Relevant Statutory Provisions And The Trial

[7] On 26 November 2020, the first respondent/accused was charged in the Magistrate Court for the offence concerned, which charge reads as follows:

A Charge:

That you, on 16th May, 2020 at around 10:00pm at Persiaran Brooke Road, in the district of Sibu, in the state of Sarawak, as the driver of a car vehicle registration number QLC5558 has driven the motor the said (sic) vehicle on the road under the influence of alcohol and caused the
B death of Chipedo Lee Chi Zhen (M) NRIC: 030209-13-1325 and thereby you have committed an offence punishable under Section 44(1) of Road Transport Act 1987.

[8] Section 44 of the RTA then in force (before Road Transport (Amendment) Act 2020 (Act A1618) came into force), provided that:

C Driving while under the influence of intoxicating liquor or drugs

44. (1). Any person who, when driving a motor vehicle on a road or other public place:

(a) is under the influence of intoxicating liquor or drug, to such an extent as to be incapable of having proper control of the vehicle; or
D

(b) has so much alcohol in his body that the proportion of it in his breath, blood or urine exceeds the prescribed limit,

and causes the death of or injury to any person shall be guilty of an offence and shall, on conviction, be punished with imprisonment for a
E term of not less than three years and not more than ten years and to a fine of not less than eight thousand ringgit and not more than twenty thousand ringgit.

(2) The court shall order particulars of any conviction under this section to be endorsed on any driving licence held by the person convicted.

F (3) A person convicted under this section shall be disqualified from holding or obtaining a driving licence for a period of not less than five years from the date of the conviction and, in the case of a second or subsequent conviction, be disqualified for a period of ten years from the date of the conviction.

G (4) Notwithstanding subsection (1), where a person who is a holder of a probationary driving licence is convicted under this section, the court shall revoke his driving licence.

(5) Notwithstanding anything in any written law for the time being in force, the court before which a person is charged with an offence under this section shall order the immediate confiscation of the driving licence
H of that person and shall order the suspension of the licence commencing from the date the charge is first read to that person and such suspension shall have effect:

(a) until the court makes a final decision on the charge; and

I (b) as if the suspension is the suspension referred to in s. 32.

[9] For the purpose of s. 44(1)(b) of the RTA, s. 45G(1) of the same Act provided that "prescribed limit" means:

(i) 35 microgrammes of alcohol in 100 millilitres of breath;

(ii) 80 milligrammes of alcohol in 100 millilitres of blood;

(iii) 107 milligrammes of alcohol in 100 millilitres of urine.

[10] The first respondent/accused pleaded not guilty to the charge.

[11] The trial commenced on 17 February 2022. The prosecution concluded its case on 19 July 2022 with the calling of eight witnesses to give evidence including the applicant (PW3).

[12] On 26 September 2022, after considering and evaluating the evidence of the witnesses called by the prosecution at the close of the prosecution's case, the learned Magistrate found that the prosecution had failed to establish a *prima facie* case of the offence that the first respondent/accused was charged.

[13] The Magistrate Court accordingly acquitted and discharged the first respondent/accused without requiring the first respondent/accused to enter his defence.

Summary Of The Grounds Of The Decision Of The Learned Magistrate

[14] The learned Magistrate in essence found as facts that the first respondent/accused was the driver of motorcar bearing registration number of QLC5558 which involved in a collision with the motorcycle bearing registration number QSE5427 ridden by the deceased on a public road and that the deceased was killed in the collision.

[15] The learned Magistrate found that the prosecution had not established by evidence that the first respondent/accused was driving the motorcar concerned under the influence of alcohol, which impaired the first respondent's/accused's ability to control it, leading to the accident and the ensuing death of the deceased.

[16] The evidence adduced by the prosecution to establish that the respondent/accused was at the material times under the influence of alcohol is a report dated 24 June 2020 (exh. P4) made under s. 399 of the Criminal Procedure Code (CPC) by PW2, Ahli Kimia of the Jabatan Kimia Malaysia who analysed the blood specimen allegedly taken from the first respondent/accused and contained in a plastic tube sealed with a security seal and labelled with the name of the first respondent/accused and identity card number delivered by PW8 (investigating officer [IO]) on 19 May 2020 in an envelope marked "E" with the seal of "Polis Di-Raja 398" for analysis.

[17] By the report (exh. P4) of the PW2, upon his analysis of the blood specimen, it contained 162 milligrams of alcohol in 100 millilitres of blood well over the statutory prescribed limit then.

[18] The learned Magistrate rejected the said report (exh. P4) of PW2 on the basis that there was a fatal break in the chain of evidence relating to the blood specimen allegedly of the first respondent/accused as there was a lack of evidence on the details such as the exact date and time the blood specimen of the respondent/accused was obtained at Hospital Sibu, the identity of the person accompanying the first respondent/accused, and the specific individual responsible for extracting the blood specimen. Additionally, evidence concerning the methodology of the extraction, the proper sealing and labelling of the blood specimen, the marking on the specimen, and the subsequent handling and storage by the police are all missing.

[19] The learned Magistrate also concurred with the submission of learned counsel for the first respondent/accused that the prosecution's failure to call the medical officer who took the blood specimen and failure to produce the required certificate under s. 45F(3) of the RTA resulted in the break in the chain of evidence and that the blood specimen taken from the first respondent/accused has to be disregarded.

[20] As to the occurrence of the road accident, the learned Magistrate also agreed with the submission of learned counsel for the first respondent/accused that the prosecution had failed to provide a detailed explanation of how the collision occurred in the case.

[21] The learned Magistrate found the prosecution's witness (PW8) only read the legend of the sketch plan without explaining the events leading to the collision. The prosecution had also failed to explain and appraised the court regarding the value of the sketch plan or how was it that it was the fault of the first respondent/accused in the collision.

The Principle Of Law For Criminal Revision

[22] Section 323 of the CPC provides that:

> 323 Powers to call for records of subordinate Courts
>
> (1) A Judge may call for and examine the record of any proceeding before any subordinate Criminal Court **for the purpose of satisfying** himself as to the **correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings** of that subordinate Court.
>
> (2) Orders made under sections 97 and 98 are not proceedings within the meaning of this section.
>
> (emphasis added)

[23] Section 323 of the CPC confers upon the High Court a kind of paternal or supervisory jurisdiction to correct a miscarriage of justice arising from misconception in law, irregularity of procedure, neglect of proper precautions or apparent harshness of treatment, which has resulted on the one hand in some injury to the due maintenance of law and order, or on the other hand in some undeserved hardship to individuals.

See: *Emperor v. Nasrullah & Others* AIR 1928 All 287; *Liaw Kwai Wah & Anor v. PP* [1987] 1 CLJ 35; [1987] CLJ (Rep) 163; [1987] 2 MLJ 69 (SC); *Tan Sri Eric Chia Eng Hock v. PP* [2007] 1 CLJ 565; [2007] 2 MLJ 101 (FC); and *PP v. Kulasingam* [1974] 1 LNS 118; [1974] 2 MLJ 26.

[24] The powers of the High Court in revision are exercisable at the discretion of the court. The discretionary power is untrammelled and free, so as to be fairly exercised according to the exigencies of each case. It must be exercised judicially and within the limits and in the spirit of the legislation.

See: *Re Soo Leot* [1955] 1 LNS 127; [1956] MLJ 54; *Ng Kim Han & Ors v. PP* [2001] 2 SLR 293; and *Sia Cheng Soon & Anor v. Tengku Ismail Tengku Ibrahim* [2008] 5 CLJ 201; [2008] 3 MLJ 753 (FC).

[25] The discretionary power is exercised primarily for the purpose of correcting any miscarriage of justice.

See: *Liaw Kwai Wah & Anor v. PP* (*supra*); *Re Radha Krishna Naidu* [1961] 1 LNS 112; [1962] MLJ 130; *Rajendran M Gurusamy v. PP* [2001] 1 CLJ 631; [2000] 4 MLJ 639; *PP v. Zhao Jingeng & Ors* [2010] 7 CLJ 516; [2010] 7 MLJ 306; and *Tan Sri Eric Chia Eng Hock v. PP* (*supra*).

[26] Section 324 of the CPC provides that:

> 324 Power to order further inquiry
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> (1) On examining any record under s. 323 or otherwise, a Judge may direct the Magistrate to make, and the Magistrate shall make, **further inquiry** into any complaint which has been dismissed under s. 135, or **into the case of any accused person who has been discharged**.
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> (2) Section 303A shall apply for the construction of subsection (1).
>
> (emphasis added)

[27] Section 325 of the CPC provides that:

> 325 Powers of Judge on revision
>
> (1) A Judge may, in any case the record of the proceedings of which has been called for by himself or which otherwise comes to his knowledge, **in his discretion, exercise any of the powers conferred by sections 311, 315, 316 and 317 of this Code**.
>
> (2) **No order** under this section **shall be made to the prejudice of the accused unless he has had on opportunity of being heard**, either personally or by advocate, in his own defence.
>
> (3) **Nothing in this section shall be deemed to authorise a Judge to convert a finding of acquittal into one of conviction**.
>
> (emphasis added)

[28] It is pertinent that on revision, s. 325 of the CPC also confers on the High Court all the powers under s. 315 (issuance of a warrant of arrest of the accused), s. 316 (decision on appeal) and s. 317 (taking of further evidence) of the CPC as conferred in its appellate jurisdiction.

[29] In carrying the task under s. 323 of the CPC and if necessary and for the correction of any miscarriage of justice, a High Court Judge is empowered to exercise any of the powers as conferred by ss. 324 and 325 of the CPC subject to any limitations therein (*eg*, s. 325(3) (to convert a finding of acquittal into one of conviction)).

Grievances Of The Applicant And Submissions Of The Parties

[30] Learned counsel for the first respondent/accused extensively submitted about the correctness, legality, or propriety of the learned Magistrate's finding that the prosecution failed to establish a *prima facie* case against the first respondent/accused based on the evidence presented during the prosecution's case.

[31] He also submitted the prosecutorial discretion of the Public Prosecutor and their prerogative under art. 145(3) of the Federal Constitution and s. 376(1) of the CPC regarding the decision to prosecute, not to prosecute, or to discontinue any criminal proceeding, subject to judicial review.

[32] Learned counsel for the first respondent/accused contended that there were no misconceptions of law, irregularities of procedure, neglect of proper precautions, or apparent harshness of treatment committed by the learned Magistrate that would have resulted in a miscarriage of justice at the close of the prosecution's case in the lower court.

[33] However, the grievances of the applicant are not really directed against the correctness, legality or propriety of any findings of the learned Magistrate based on the evidence adduced in the trial or the decision of the Public Prosecutor not to appeal against the said decision on the merits.

[34] The submission by learned counsel for the applicant, as well as the *amicus curiae*, is not that there were incorrectness, illegality, or impropriety in any findings or misconceptions of law committed by the learned Magistrate based on evidence in acquitting and discharging the first respondent/accused with regards to the charge.

[35] The grievances and submissions of the applicant, through her counsel and the *amicus curiae*, are essentially directed at the irregularity and impropriety in the prosecution of the charge against the first respondent/accused and the conduct of the trial by the prosecution officer.

[36] This includes the failure of the prosecution officer to present specific evidence regarding the blood specimen taken from the first respondent/accused, which was analysed by PW2 and reported in exh. P4 to contain 162 milligrammes of alcohol in 100 millilitres of blood and to present evidence also regarding the occurrence of the collision which caused the death of the deceased which contributed to the findings made by the learned Magistrate and the subsequent acquittal and discharge of the first respondent/accused.

[37] In essence, the contention is that the prosecution officer in this case conducted the trial in the prosecution of the charge against the first respondent/accused incompetently or in a perfunctory manner, resulting in insufficient evidence being adduced to establish a *prima facie* case and causing a miscarriage of justice.

[38] It is submitted that the court, in its revisionary jurisdiction under s. 323 of the CPC, ought to put it right by the exercise of the powers conferred by ss. 324 and 325 of the CPC subject to any limitations therein.

[39] Learned counsel for the applicant prays that the criminal revision be allowed and that this court exercises its power under s. 317 of the CPC to order the taking of further evidence in respect of the related matters. If not, the applicant prays that the court exercises its power under s. 316 of the CPC to order a retrial of the case.

[40] As to the power to order the taking of further evidence under s. 317 of the CPC, learned counsel for the first respondent/accused submitted that the power is only available to the court in its appellate jurisdiction, meaning, in an appeal against the decision of the learned Magistrate but not available to the court in the exercise of its revisionary jurisdiction. The submission cannot be right in view of the provisions in s. 325(1) of the CPC.

[41] Learned counsel for the first respondent/accused also submitted that there are no exceptional circumstances to adduce further evidence.

[42] He submitted that incompetency, if any, on the part of learned prosecution officer in conducting the trial in prosecution of the charge against the first respondent/accused in this case does not constitute a valid reason for retrial.

[43] As to the order for retrial, learned counsel for the first respondent/accused submitted that it would be highly prejudicial to the first respondent/accused that may occasion a miscarriage of justice where a fair trial is not afforded to the first respondent/accused under the article of Federal Constitution and/or override the long established principle of law enunciated by the Federal Court in *Ti Chuee Hiang v. PP* [1995] 3 CLJ 1; [1995] 2 MLJ 433, whatever he meant.

[44] Learned Deputy Public Prosecutor's submission in summary is that the application for revision cannot be used as a back door to an appeal which he submitted that was what the applicant was attempting to do. He submitted that it is the right of the Public Prosecutor whether to lodge an appeal and the applicant had no such right.

[45] His submission in gist is that, the applicant has no legal right of recourse or remedy even if there is a miscarriage of justice in the circumstances.

What Amounts To Miscarriage Of Justice?

[46] Most of the reported cases where it was held that there was a miscarriage of justice involved a situation where the accused was wrongfully convicted due to violations of some principle of law or procedure or when the accused were not given a fair trial, resulting in the unjust decision of their conviction.

[47] If the defence counsel for the accused fails to provide competent representation, such as by neglecting to investigate crucial evidence or failing to present a strong defence available, it can undermine the accused's right to a fair trial.

[48] In *Yahya Hussein Mohsen Abdulrab v. PP* [2021] 9 CLJ 414; [2021] 5 MLJ 811 (FC), the accused was initially found guilty by the High Court for drug trafficking under s. 39B(1)(a) of the Dangerous Drugs Act 1952 and sentenced to death under s. 39B(2) of the same Act. However, on appeal to the Court of Appeal, the conviction was quashed due to the incompetence of the accused's defence counsel as found by the Court of Appeal, and a retrial before another High Court Judge was ordered.

[49] The prosecution appealed to the Federal Court, which affirmed the decision of the Court of Appeal in quashing the conviction by the High Court. However, the order for retrial was set aside, and the accused was acquitted and discharged instead by the Federal Court.

[50] The Federal Court held that flagrant incompetency of the defence counsel in the conduct of the accused's defence in the trial amounted to miscarriage of justice.

[51] The Federal Court held that "the focus of the inquiry by the court is not on the advocacy skills or performance of trial counsel, rather it is **the acts or omissions themselves as they impact on the fairness of the trial** and whether the result constitute a miscarriage of justice". (emphasis added)

[52] In essence, if the conduct of counsel has resulted in an unfair trial, that of itself constitutes a miscarriage of justice.

[53] While the term "miscarriage of justice" is often associated with wrongful convictions of the accused, it can occur when the prosecution demonstrates incompetence or engages in perfunctory conduct, resulting in an acquittal or discharge of the accused.

[54] In such cases, the legal process equally fails to effectively present or prosecute the case, leading to an unjust outcome.

[55] In *Reg v. Sang* [1980] AC 402, Lord Diplock at p. 436 stated:

> ... the fairness of a trial according to law is not all one-sided; it requires that those who are undoubtedly guilty should be convicted as well as those about whose guilt there is any reasonable doubt should be acquitted ...

[56] The conviction of an innocent person is undoubtedly a grave miscarriage of justice as it results in wrongful punishment and the loss of freedom for someone who is not guilty. This inflicts irreparable harm to their life and reputation.

[57] On the other hand, if a guilty person is acquitted, they avoid being held accountable for their actions, enabling them to continue their harmful behaviour. This perpetuates injustice, poses a threat to others, and denies justice to the victims and their families, leaving them without closure or the opportunity for redress.

[58] Both outcomes undermine the principles of fairness, equity, and the rule of law, eroding public trust in the fairness and dependability of the criminal justice system.

[59] Therefore, the acquittal of the guilty can be just as much a miscarriage of justice as the conviction of an innocent person.

[60] In *Zahira Habibulla H Sheikh v. State of Gujarat* AIR 2004 SC 3114, Justice Arijit Pasayat of the Supreme Court of India held that:

> Right from the inception of the judicial system it has been accepted that *discovery, vindication and establishment of truth are the main purposes underlying existence of Courts of justice. The operative principles for a fair trial permeate the common law in both civil and criminal contexts. Application of these principles involves a delicate judicial balancing of competing interests in a criminal trial, the interests of the accused and the public and to a great extent that of the victim have to be weighed not losing sight of the public interest involved in the prosecution of persons who commit offences. ...*
>
> This Court has often emphasised that in a criminal case the fate of the proceedings cannot always be left entirely in the hands of the parties, *crime being public wrong in breach and violation of public rights and duties, which affect the whole community as a community and are harmful to the society in general. The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies*. Interests of society is not to be treated completely with disdain

A and as *persona non grata*. *Courts have always been considered to have an over-riding duty to maintain public confidence in the administration of justice - often referred to as the duty to vindicate and uphold the 'majesty of the law'*. Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a Court of law in the future as in the case before it. *If a criminal Court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. Courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the judges as impartial and independent adjudicators*. The principles of rule of law and due process are closely linked with human rights protection. Such rights can be protected effectively when a citizen has recourse to the Courts of law. *It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned*. There can be no analytical, all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind *viz*. whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted. *It will not be correct to say that it is only the accused who must be fairly dealt with. That would be turning a Nelson's eye to the needs of the society at large and the victims or their family members and relatives. Each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as is to the victim and the society*. Fair trial obviously would mean a trial before an impartial Judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial. A criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at a judgment on an issue as to a fact or relevant facts which may lead to the discovery of the fact issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused. *Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not about over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty*. The proof of charge which has to be beyond reasonable doubt must depend upon judicial evaluation of the totality of the evidence, oral and circumstantial, and not by an isolated scrutiny. (emphasis added)

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[61] In that case, Justice Arijit Pasayat sitting in the apex court of India also stated:

> It was significantly said that law, to be just and fair has to be seen devoid of flaw. It has to keep promise to justice and it cannot stay petrified and sit non-challantly. **The law should not be seen to sit by limply, while those who defy it go free and those who seek its protection loose hope** ... (emphasis added)

[62] His statement emphasises the need for a just and fair criminal justice system to be free from flaws and actively uphold the principles of justice to ensure accountability for those who break the law, and provides reliable protection for and confidence in those who rely on it.

[63] Justice Arijit Pasayat in that case also referred to s. 311 of the Indian Criminal Procedure Code (*in pari materia* with s. 425 of our Criminal Procedure Code) which empowers the court to summon and examine material witnesses. He held as follows:

> *The section is manifestly in two parts*. Whereas the word used in the first part is "may", the second part uses "shall". In consequences, the first part gives purely discretionary authority to a Criminal Court and enables it at any stage of an enquiry, trial or proceeding under the Code (a) to summon any one as a witness, or (b) to examine any person present in Court, or (c) to recall and re-examine any person whose evidence has already been recorded. *On the other hand, the second part is mandatory and compels the Court to take any of the aforementioned steps if the new evidence appears to it essential to the just decision of the case. This is a supplementary provision enabling, and in certain circumstances imposing on the Court the duty of examining a material witness who would not be otherwise brought before it*. It is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the Court should be exercised, or with regard to the manner in which it should be exercised. It is not only the prerogative but also the plain duty of a Court to examine such of those witnesses as it considers absolutely necessary for doing justice between the State and the subject. *There is a duty cast upon the Court to arrive at the truth by all lawful means and one of such means is the examination of witnesses of its own accord when for certain obvious reasons either party is not prepared to call witnesses who are known to be in a position to speak important relevant facts*.
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> *The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the Court to summon a witness under the Section merely because the evidence supports the case for the prosecution and not that of the accused*. The section is a general section which applies to all proceedings, enquiries and

A trials under the Code and empowers Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is "at any stage of inquiry or trial or other proceeding under this Code". It is, however, to be borne in mind that whereas the section confers a very wide power on the Court on summoning witnesses, the discretion conferred is to be exercised
B judiciously, as the wider the power the greater is the necessity for application of judicial mind. (emphasis added)

[64] In summary, it was held that s. 311 of the Indian Criminal Procedure Code (*in pari materia* with s. 425 of our Criminal Procedure Code) is divided into two parts. Though under the first part, the court has the discretion to
C exercise the power to summon witnesses, examine any person present in court though not called as a witness, or recall and re-examine witnesses whose testimony has already been recorded under the second part, it mandatory or the court is obligated to exercise these powers when new evidence is deemed essential for a just decision whether they support the
D prosecution or the accused. The section aims to prevent failures of justice caused by the omission of valuable evidence or ambiguities in witness statements.

[65] As to the importance of the power entrusted to the court under s. 311 of the Indian Criminal Procedure Code as a consequence of defective
E investigation, Justice Arijit Pasayat in that case stated:

Consequences of defective investigation have been elaborated in *Dhanraj Singh @ Shera and Ors v. State of Punjab* (JT 2004(3) SC 380). It was observed as follows:

F 5. In the case of a defective investigation the Court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective. (See *Karnel Singh v. State of M.P* (1995 (5) SCC 518).

G 6. In *Paras Yadav and Ors. v. State of Bihar* (1999 (2) SCC 126) it was held that if the lapse or omission is committed by the investigating agency or because of negligence the prosecution evidence is required to be examined de hors such omissions to find out whether the said evidence is reliable or not. The contaminated
H conduct of officials should not stand on the way of evaluating the evidence by the courts; otherwise the designed mischief would be perpetuated and justice would be denied to the complainant party.

7. As was observed in *Ram Bihari Yadav v. State of Bihar and Ors* (1998 (4) SCC 517) if primacy is given to such designed or negligent investigation, to the omission or lapses by perfunctory
I investigation or omissions, the faith and confidence of the people

would be shaken not only in the Law enforcing agency but also in the administration of justice. The view was again re-iterated in *Amar Singh v. Balwinder Singh and Ors.* (2003 (2) SCC 518).

[66] For ease of analysis, s. 425 of our CPC is reproduced as follows:

425 Power of Court to summon and examine persons

Any Court **may at any stage** of any inquiry, trial or other proceeding under this Code summon any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine any person already examined, and **the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case**.

(emphasis added)

[67] The Supreme Court in *Ramli Kechik v. PP* [1986] 1 CLJ 308; [1986] CLJ (Rep) 243; [1986] 2 MLJ 33 (SC) also held to the same effect in respect of s. 425 of the CPC, where Justice Mohamed Azmi SCJ stated at p. 34:

For this purpose, s. 540 Indian Criminal Procedure Code 1898 is *in pari materia* with our s. 425. From the commentaries on the *Code of Criminal Procedure 1898* by Chitaley & Rao, Vol. IV (5th Edition) *the scope of this section is to enable and in certain circumstances to impose on the court the duty of summoning witnesses who would not otherwise be brought before the court. The section consists of two parts*, the first giving a discretionary power to the court under which it may (1) summon any person as a witness or (2) examine any witness in attendance, though not summoned as a witness or (3) re-call or re-examine any person already examined. *The second part of the section imposes an obligation on the court to summon and examine or re-call and re-examine any such person if his evidence appears essential to the just decision of the case. The section is intended to enable the court to get at the truth and to come to a proper conclusion in the matter under inquiry or trial. It is not limited to witnesses whom the court examines on its own behalf but also applies to witnesses for the prosecution as well as witnesses for the defence*. Hence, the defence as well as the prosecution may be allowed to adduce additional evidence under this section. *The object of the section is just as much the prevention of escape of a guilty person through some carelessness of the prosecution or the Magistrate as the vindication of the innocence of the person wrongly accused owing to the carelessness and ignorance of one party. If there is the apprehension of justice failing by an erroneous acquittal or by an erroneous conviction the court would be justified in exercising its discretion in calling for additional evidence under this section. Where the court is of the opinion that the evidence of certain witnesses is essential to the just decision of the case, it is bound to summon them, and for this purpose the trial can be adjourned. A just decision under this section does not mean a decision in favour of the defence* (see *Rengaswami Naicker*'s case [1954] Cr LJ 123). Thus, it would not be an improper exercise of the power merely because the evidence taken supports the case of the prosecution and not that of the accused. In our view, by its very nature the discretion to be exercised under s. 425 C.P.C. depends on the facts of each case – the main consideration being the essentiality of the additional evidence to a just decision of the case. (emphasis added)

A See also: *PP v. Phon Nam* [1989] 1 CLJ 7; [1989] 1 CLJ (Rep) 142; [1988] 3 MLJ 415 (SC); *PP v. Harilal Sachi Narayan* [1995] 4 CLJ 745; [1995] 4 MLJ 661; *PP v. Abdul Rahim Abdul Satar* [1990] 1 CLJ 840; [1990] 3 CLJ (Rep) 1; [1990] 3 MLJ 188; *Mohammad Ali Mohd Noor v. PP* [1996] 3 SLR 276; and *Saravanan Ganesan v. PP* [2003] SGHC 273.

B **[68]** In *K Chinnaswamy Reddy v. State Of Andhra Pradesh* 1962 AIR 1788, 1963 SCR (3) 412, the Supreme Court of India emphasised that it is open to the High Court to exercise its revisionary jurisdiction to set aside an order of acquittal even at the instance of private parties, though the State may not have thought fit to appeal.

C **[69]** The Supreme Court of India further held that the revisional jurisdiction should be exercised by the High Court in exceptional cases only when there is some glaring defect in the procedure or a manifest error on a point of law resulting in a flagrant miscarriage of justice.

D **[70]** However, the Supreme Court of India also held and recognised that it is not feasible to establish a fixed set of criteria to determine these exceptional cases, as they can vary depending on different circumstances and contingencies, though it provided an illustration of a few cases in which the revisionary jurisdiction could be properly exercised to set aside an acquittal, such as by a court lacking jurisdiction or excluding evidence which was admissible or relying on inadmissible evidence or where material evidence has been overlooked.

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[71] Thus, each case must be evaluated on its own merits, taking into account the specific facts and circumstances, to determine whether the exercise of revisionary powers by the High Court to set aside an acquittal and to order a retrial is justified.

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[72] In the case of *Kanagaraj v. State of Tamil Nadu* (2007) 2 MLJ (Crl) 5, three accused individuals were charged under s. 302 of the Indian Penal Code for the death of the deceased. The prosecution presented nine witnesses to provide evidence on the charges in the trial. However, the Court of Sessions, after assessing the available evidence, concluded that the prosecution had failed to establish the guilt of the accused as charged, resulting in the acquittal of all the accused.

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[73] Upon filing a petition for revision of the lower court's decision to acquit the accused, it was discovered that two crucial eyewitnesses who had witnessed the assault by the accused on the deceased had been examined during the investigation under s. 161(3) of the Indian Criminal Procedure Code (Cr PC), and their names were included in the witness list. However, during the trial, the prosecution failed to call and examine these key witnesses in court. Additionally, the doctor who conducted the post-mortem examination of the deceased and the investigating officer were also not called to testify.

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[74] The Madras High Court determined that the lower court should have taken appropriate measures under s. 311 of the Indian Criminal Procedure Code (*in pari materia* with s. 425 of our CPC) to examine the two eyewitnesses, but it failed to do so, resulting in a "clear non-feasance which resulted in flagrant miscarriage of justice".

[75] Furthermore, the Madras High Court also held that the lower court committed a "stupendous mistake" by not taking any steps to examine the doctor who conducted the autopsy and the investigating officer.

[76] The Madras High Court also found that both the Public Prosecutor and the lower court in that case had conducted the trial in a perfunctory manner and had adopted desultory conduct in the conduct of the trial which resulted in a flagrant miscarriage of justice. Consequently, the application for criminal revision was allowed, and the case was remitted to the lower court for retrial.

[77] In the premises, the revisionary jurisdiction and power under ss. 323, 324 and 325 of the Criminal Procedure Code (CPC) can be exercised by the court to correct a miscarriage of justice attributed to the incompetent investigation and/or incompetent prosecution of a charge which led to the acquittal of an accused.

Perusal And Examination Of The Record Of Proceeding Before The Magistrate Court

[78] For the purpose of applicant's application, this court has called for, perused and examined the entire record and proceeding in the Magistrate Court.

[79] In relation to the conduct of the prosecution officer during the trial, only PW2 and PW8 were called as witnesses to establish that the first respondent/accused was under the influence of alcohol at the relevant times.

[80] PW2 gave evidence by his witness statement (WSPW2) that he received the blood specimen contained in a plastic tube with the security seal and labelled with the name and identification card number of the first respondent/accused on 19 May 2020 from PW8.

[81] PW2 testified about the storage and subsequent analysis of the blood specimen, revealing an alcohol content of 162 milligrammes per 100 millilitres. He further confirmed that he prepared the report dated 24 June 2020, in accordance with s. 399 of the CPC, which was admitted as exh. P4. This report substantiated his finding of the alcohol level in the provided blood specimen.

[82] Additionally, PW2 testified that after conducting the analysis, he placed the blood specimen in a Jabatan Kimia Malaysia security plastic bag marked 'E', bearing serial number B 1025840 and laboratory number 20-FR-V-00562, which he signed and stored in a locked refrigerator. He also gave evidence that he returned the same to PW8 on 24 June 2020.

A **[83]** Thus, in the instant case, there is evidence by PW2 which established that he has carried out alcohol analysis and test of the blood specimen in a plastic tube delivered to him by PW8 which blood specimen was alleged to have been collected from the first respondent/accused and that it contained 162 milligrammes of alcohol in 100 millilitres of blood.

B **[84]** However, the prosecution officer conducting the trial did not see it fit as a matter of cogency to introduce and produce the tube of blood specimen allegedly analysed by PW2 and to call and/or examine witnesses to establish the chain of evidence that the tube of blood specimen was taken from the first respondent/accused, so analysed by PW2, returned to PW8 and presented C in court as exhibit.

[85] In order to establish that the first respondent/accused was under the influence of alcohol, it is not only essential but indeed elementary for the investigation officer and prosecution officer to both know and to establish that the blood specimen analysed by PW2 was indeed obtained from the first D respondent/accused.

[86] Furthermore, when prosecuting a charge under s. 44 of the Road Transport Act 1987 (RTA) for driving a motor vehicle under the influence of alcohol resulting in the death of another person, it is imperative for the investigation officer and prosecution officer to be well-versed in the E provisions specified in s. 45F of the RTA, which outlined the procedure for obtaining a blood specimen from an accused for alcohol content analysis and testing.

[87] Specifically, s. 45F(3) of the RTA requires a specimen of blood to be F taken from the accused by a Government medical officer. According to the provision, the production of a document certifying the proper collection of the blood specimen, signed by a Government medical officer, can serve as evidence.

[88] However, under s. 45F(4) of the RTA, this document is admissible in G evidence on behalf of the prosecution only if a copy of it was either provided to the accused when the document was produced or served on the accused no later than seven days before the hearing. It also stipulates that any other document is admissible as evidence if a copy of it has been served on the accused no later than seven days before the hearing. Nevertheless, if the H accused, no later than three days before the hearing (or within a further time granted by the court in special circumstances), serves notice on the prosecution requiring the attendance of the person who signed the document, a document purports to be a certificate (or the relevant portion of it) is not admissible.

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[89] Therefore, if the investigation officer and the prosecution officer do not intend to summon the Government medical officer to testify about the collection of the blood specimen, it is essential for them to fully comprehend the requirements outlined in s. 45F of the RTA regarding the admissibility of documents with the certification and the timely serving of copies to the accused.

[90] The examination of the notes of proceeding for the trial before the Magistrates reveal glaring omissions and neglects: no witnesses were called to give evidence on the collection of the blood specimen from the first respondent/accused. Crucial evidential details, such as who collected the specimen, when it was obtained, and the subsequent handling leading to its delivery by PW8 to PW2 for alcohol analysis remained unaddressed.

[91] Another puzzling and troubling aspect is the apparent failure to comply with the requirements outlined in s. 45F(3) and (4) of the RTA regarding the production of documents with certification by the Government medical officer, attesting to the taking of the blood specimen from the first respondent/accused. There is nothing to indicate any efforts were made to fulfil these requirements or intention to call the Government medical officer concerned to give evidence instead.

[92] The prosecution officer made no attempt to elicit evidence from witnesses regarding the collection of the blood specimen from the first respondent/accused.

[93] The prosecution officer failed to make any attempt to elicit evidence from witnesses regarding the collection of the blood specimen from the first respondent/accused. Furthermore, they did not call upon any other witnesses who could provide relevant testimony on this crucial matter.

[94] Notably, the prosecution only elicited evidence from PW8 during re-examination, about bringing the first respondent/accused to the hospital for the blood specimen collection to counter the suggestion made by the first respondent's/accused's counsel during cross-examination that no blood sample/specimen was taken from the first respondent/accused and that the first respondent/accused did not consume alcohol at the relevant times.

[95] Regarding the cause of the collision between the two vehicles, PW8 provided evidence that he prepared the sketch plan, which was produced and admitted as exh. P13(1-4). PW8 also testified about the meaning of the markings stated in the sketch plan.

[96] Though the sketch plan shows the *locus* of the motorcar driven by the first respondent/accused was on the wrong side of the road against the direction towards Pusat Bandar and also displayed alleged scratch marks on the road upon first impact in the collision, the prosecution officer failed to

question PW8 to explain the process of preparing the sketch plan and to give an explanation regarding the meaning and implication behind the various markings and measurements.

[97] During the trial, the prosecution officer presented evidence through PW6, who testified about the presence of CCTV cameras in her office. According to PW6, these cameras recorded road traffic and captured the collision that occurred during the relevant time period. She further stated that she retrieved the recorded footage, saved it on a pendrive, and handed it over to a police officer.

[98] This court acknowledges the lack of consistency in PW6's testimony. In her examination-in-chief, she claimed that the CCTV cameras recorded road traffic and captured the collision, which took place after her office hours. However, during cross-examination, PW6 mentioned her responsibility to switch the CCTV cameras on and off when she started and finished working. She said that her typical workday started at around 7.50am and ended at approximately 5.15pm.

[99] The confusion or inconsistency in her answers in cross-examination is how the CCTV could capture the collision after PW6's office hours?

[100] The learned Magistrate upheld the objection raised by the counsel for the first respondent/accused, which prevented the prosecution officer from re-examining PW6 regarding her certainty in switching the CCTV on and off. The formulation of the question during the re-examination was unfortunate. Instead, PW6 could have been directed to address the inconsistencies and provide an explanation regarding how the CCTV could capture the collision after her office hours, despite her claim of switching it off.

[101] Nevertheless, the learned Magistrate should have allowed the prosecution officer to clarify the inconsistencies rather than concluding that PW6's answer was clear and that no further examination was necessary.

[102] It should have been recognised that there was confusion surrounding the issue due to the inconsistencies, to which the prosecution officer is entitled and should be allowed to formulate questions in the re-examination of PW6 to provide additional explanation and clarification.

[103] Furthermore, PW8 testified that he obtained the CCTV footage and burned it onto a CD. Unfortunately, the CD could not be played in the courtroom during the proceedings, preventing PW8 from confirming its contents (marked as IDD2(1-2)).

[104] Despite PW8's disagreement with the defence counsel's claim that there was no CCTV recording of the collision and considering the CD's inoperability, the prosecution officer neglected to further inquire from PW8,

the process PW8 used to burn the CCTV footage onto the CD. Additionally, the prosecution officer also did not inquire about the source of the pendrive or attempt to present it as evidence.

[105] The prosecution officer did not see it fit and appropriate to request an adjournment of the trial or an opportunity to address any defects in the CD. Instead, the prosecution case was closed hastily and somewhat lackadaisically, disregarding the necessary steps that could have allowed PW8 to rectify any issues pertaining to the CD.

[106] Given the numerous omissions in this case which is unacceptable, the court finds the conduct of the trial for the offence in question by the prosecution and investigation officer (PW8) to be perfunctory and lethargic.

[107] Given the circumstances, the learned Magistrate also failed to consider and recognise the necessity of exercising the power conferred upon the Magistrate Court under s. 425 of the Criminal Procedure Code (CPC) to ensure a just decision in the case.

[108] These omissions go to and impact "the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity", of the proceedings in the Magistrate Court envisaged by s. 323 of the CPC.

[109] Whether the omissions were due to oversight, ignorance, negligence, intentional or unintentional or whatever motivation, the demonstrated standard of competency in the conduct of the prosecution in this case, falls significantly below the reasonable expectations of fairness and justice to the complainant/victim and to the public for upholding public confidence in the administration of justice.

[110] In the case of *Kocharya v. The State of Maharashtra* (2010) 112 Bom LR 1975, a road accident occurred involving a bus driven by the second respondent/accused and a motorbike ridden by the deceased's husband, resulting in the death of the deceased who was a pillion rider. The second respondent/accused was charged with an offence in relation to the accident. During the trial, the prosecution called only two witnesses to provide evidence. Based on the testimony of these witnesses, the Judicial Magistrate acquitted the second respondent/accused.

[111] Subsequently, the father of the deceased filed an application for revision, alleging impropriety in the conduct of the prosecution of the second respondent/accused and requesting the court to order a retrial. According to the applicant in that case, even the first information report was not exhibited, the medical officer was not examined, and the post-mortem report was also not presented as evidence.

[112] The Bombay High Court in India granted the applicant's application, quashed and set aside the order of acquittal of the Magistrate in that case and ordered a retrial.

[113] Justice SB Deshmukh, J in that case held that:

> 14. ... *It was for the prosecution to see that the documents, which are brought on record, are formally or properly proved*. In the case on hand, it was the duty of the prosecution at-least to see that the first information report, spot Panchanama, the postmortem report are established and exhibited. Even though two witnesses were examined, the prosecution ought to have examined the investigating officer. Even for the accused person, if some omission or contradiction is to be established, to be brought on record, examination of investigating officer is necessary. Thus, *in fair trial, even from the view point of the accused person, the prosecution ought to have at-least examined the complainant, investigating officer, medical officer and eye-witness, if any*.
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> 15. *In a criminal trial, Court has to take into consideration right of complainant/victim and right vested with the accused person. The court seized with the trial is under legal duty to give proper and fair opportunity to all the parties, however, shall not ignore the injustice likely to be caused to the complainant on account of lethargy on the part of the prosecution. Pendency of the cases before the Court is a matter of concern not only for the accused person or others but everyone involved in the process of administration of justice. But, then, the Court has to see that justice will be done to every one ie, to the complainant and accused as well. The Court seized with the criminal trial is armed with sufficient power to enforce the attendance of any of the witness. In the case on hand, only because the occurrence is dated 6th September, 2004, the accused suffered the trial for around 2 1/2 years, cannot be a reason to dismiss the present criminal revision application. In my view, petitioner has established a case for interference by this Court under s. 401 of the Code for directing retrial of the case by the learned Judicial Magistrate, First Class*.
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> (emphasis added)

[114] In *UJ Iyyappan v. The State Of Kerala; Rosy; & Abraham @ Avarachan* Crl.Rev.Pet.No. 155 of 2002, the applicant for revision was the owner of a property situated near Shakthan Thamburan bus stand in Thrissur town. The applicant alleged that the accused, with a common intention to deceive, committed impersonation and executed a forged sale deed in which fifth accused posed as the applicant and transferred the property to first accused and second accused. Furthermore, second accused, who is the son of first accused, subsequently gifted his rights in the property to third accused.

[115] Upon the applicant's complaint in that case, an FIR (first information report) was filed, leading to an investigation and the subsequent filing of a charge sheet. During the trial before the Magistrate, 12 witnesses, including the applicant, testified, and various exhibits were presented. However, the Magistrate acquitted the accused primarily due to the prosecution's failure to provide the signatures that were purportedly belonging to the applicant for comparison with his specimen signatures.

[116] The High Court of Kerala granted the applicant's application for revision in the aforementioned case. It determined that the investigation conducted was tainted and unfair, resulting in a flagrant miscarriage of justice. The court concluded that further investigation was necessary to ensure a complete and just resolution of the case. As a result, the High Court set aside the acquittal verdict issued by the Magistrate and remanded the case back to the Magistrate Court for a fresh disposal. The investigation officer was directed to conduct further investigation on the matter and submit an additional report.

[117] In the premises and for the reasons as given, this court finds that a flagrant miscarriage of justice has occurred in this case. It is an exceptional case and it is imperative for the court, in the exercise of its revisionary power, to put it right.

[118] This court does not accept the submission of learned counsel for the first respondent/accused that an order for retrial would prejudice the first respondent's/accused's right to a fair trial citing *Ti Chuee Hiang v. PP* [1995] (SC) (*supra*).

[119] In this case, the first respondent/accused was on bail and not remanded during the trial in the lower court, and was subsequently acquitted and discharged.

[120] Unlike the accused in *Ti Chuee Hiang v. PP* (SC) (*supra*) and *Yahya Hussein Mohsen Abdulrab v. PP* (FC) (*supra*), who were remanded throughout the trial and convicted, and thus, ordering a retrial would necessitate their remand, which would be unjust if they were acquitted as a result.

[121] Furthermore, the acquittal and discharge of the first respondent/accused by the learned Magistrate in this case was the result of the prosecution officer's incompetence in conducting the criminal proceedings.

[122] It cannot be reasonably asserted that the first respondent/accused would face prejudice or be denied a fair trial in a competent prosecution, unless they are genuinely guilty as charged.

Pronouncement And Order

[123] This court therefore, allows the applicant's application for revision and set aside the decision of the Magistrate Court on 26 November 2020 in acquitting and discharging the first respondent/accused.

[124] This court hereby remits the case back to the Magistrate Court for a retrial of the charge against the first respondent/accused, commencing from the stage of the not guilty plea entered by the first respondent/accused on 26 November 2020 as in the case of *Kocharya v. The State of Maharashtra* (*supra*).

A **[125]** The eight witnesses who were previously called by the prosecution and examined are permitted to be recalled if the prosecution deems it necessary and be further examined.

[126] The prosecution is at liberty to call any additional witnesses as it deems fit.

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[127] The first respondent/accused shall appear before the Magistrate Court for the retrial on a date to be fixed by Magistrate Court which shall be within two months from the order made hereto.

[128] After the retrial, it is for the Magistrate Court to evaluate the case C based on its own merits, considering all the evidence presented, including that which may be provided by the recalled witnesses or any newly called witnesses. This court expresses no opinion of the merits and demerits of the case.

[129] This court makes no order as to the costs of the application.

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